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In The
Supreme Court of the United States

JEFFREY J. PROSSER, DAWN PROSSER, ADRIAN PROSSER, and JOHN P. RAYNOR,

Petitioners,

v.

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION; RURAL TELEPHONE FINANCE COOPERATIVE; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; SHELDON C. PETERSEN; JOHN J. LIST; STEVEN L. LILLY; R. WAYNE STRATTON; GREENLIGHT CAPITAL, INC.; GREENLIGHT CAPITAL QUALIFIED, L.P.; GREENLIGHT CAPITAL, L.P.; GREENLIGHT CAPITAL OFFSHORE, LTD.; FULBRIGHT & JAWORSKI L.L.P.; GLENN L. ENGLISH; DELOITTE TOUCHE USA LLP; and ERNST & YOUNG LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN P. RAYNOR
Counsel of Record for All Petitioners
10110 Nicholas Street, Ste. 102
Omaha, NE 68114
Ph: 402-498-4400
JRaynor@rrplawyers.com
Pro Se

NORMAN A. ABOOD, ESQ.
152 North Summit Street
Toledo, OH 43604
Ph: 419-724-3700
Attorney for Jeffrey J. Prosser

JEFFREY B. C. MOORHEAD, ESQ.
1132 King Street, Ste. 3
Christiansted, VI 00820
Ph: 340-773-2539
Attorney for Dawn Prosser & Adrian Prosser

QUESTIONS PRESENTED

Whether the Third Circuit erred in holding that referral of Petitioner's non-core, RICO complaint (18 U.S.C. § 1964(c)) from an Article III court to an Article I court is interlocutory, *i.e.*, analogous to a transfer of venue between Article III courts, thereby denying Petitioners, non-debtor parties and a debtor which all are asserting post-bankruptcy claims, a right to a jury trial pursuant to *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

Whether the Delaware Bankruptcy Court's exercise of "related to" jurisdiction (28 U.S.C. § 157(a)) in a Chapter 7 Bankruptcy over a non-core (28 U.S.C. § 157(c)) Civil RICO action (18 U.S.C. § 1964(c)) originally filed in the Virgin Islands District Court by **Petitioners, non-debtor parties and a debtor all asserting post-bankruptcy claims**, is constitutional in light of *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) when:

a. The case upon which "related to" jurisdiction is premised, originally filed in the Delaware Bankruptcy Court was subsequently transferred to the Virgin Islands Bankruptcy Court pursuant to 28 U.S.C. § 1412 on December 14, 2006, after which the original Delaware bankruptcy case was terminated;

b. The Chapter 7 Trustee is neither a Defendant nor Plaintiff; and

c. The Chapter 7 Estate is neither a Defendant nor Plaintiff.

PARTIES TO THE PROCEEDING

Petitioners and the Civil RICO Plaintiffs are –

Jeffrey J. Prosser, Debtor and husband to Petitioner Dawn Prosser, who formerly was the chief executive officer of various business entities involved in Chapter 11 and Chapter 7 Bankruptcies (the "ICC Entities") until his termination of employment on October 8, 2007.

Dawn Prosser, wife of the Debtor, who, along with her husband, was an owner of the ICC Entities.

Adrian Prosser, the son of Debtor and Dawn Prosser, who was gainfully employed by the ICC Entities until October 17, 2007.

John Raynor, counsel herein, who was previously gainfully employed by the ICC Entities since 1986 and until the appointment of the Chapter 11 Trustee for Innovative Communication Corporation on October 3, 2007.

Respondents and Civil RICO defendants are –

National Rural Utilities Cooperative Finance Corporation ("CFC") is a cooperative association organized pursuant to the laws of the District of Columbia which is a financing cooperative that lends money and is owned rural electric cooperative associations.

PARTIES TO THE PROCEEDING – Continued

Rural Telephone Finance Cooperative ("RTFC") is a financing cooperative association now organized pursuant to the laws of the District of Columbia which operates as a captive CFC organization through which CFC loans money to rural telephone companies.

National Rural Electric Cooperative Association ("NRECA") is a trade association organization and owned by rural electric cooperative associations which established CFC as a separate entity owned and controlled by NRECA's members.

Respondents Sheldon C. Petersen, John J. List, Steven L. Lilly, and R. Wayne Stratton are officers and/or directors of CFC.

Glenn L. English is the Chief Executive Officer of NRECA.

Respondents Greenlight Capital, Inc., Greenlight Capital Qualified, L.P., Greenlight Capital, L.P., Greenlight Capital Offshore, LTD., Fulbright & Jaworski L.L.P., Deloitte Touche USA LLP, and Ernst & Young LLP are defendants in the Civil RICO action which Petitioners allege acted to further the racketeering endeavor which satisfy all of the elements of a Civil RICO claim.

DISCLOSURE STATEMENT

There is no disclosure statement required to be submitted by any of the Petitioners pursuant to Supreme Court Rule 29.6. Counsel John Raynor is also a Petitioner/Plaintiff.

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OPINIONS/ORDERS BELOW

On August 7, 2009, the Delaware District Court entered an order (the "August 7, 2009 Referral Order") in Case No. 1:09-cv-00111, a declaratory action seeking injunctive relief (the "Delaware Declaratory Judgment Action") initiated in response to Petitioners' Civil RICO filing in the U.S. Virgin Islands ("V.I. Civil RICO Case"), granting the Respondents' motion to refer the Delaware Declaratory Judgment Action to the Honorable Judith K. Fitzgerald, a visiting judge to the United States Bankruptcy Court for the District of Delaware. *See* Pet. App. A, 1-11, for the Order and supporting Memorandum.

On December 1, 2009, the Delaware District Court entered a Memorandum Order denying Petitioners' timely filed August 21, 2009 Motion for Reconsideration of the August 7, 2009 Referral Order. *See* Pet. App. B, 12-18.

On December 8, 2009, the Virgin Islands District Court in Case No. 1-08-cv-00107 entered a Memorandum and Order referring the Petitioners' V.I. RICO Case to the Honorable Judith K. Fitzgerald, a visiting Judge. *See* Pet. App. C, 19-22.

Consolidating the District Court cases for purposes of appeal, on August 30, 2010, the Third Circuit Court of Appeals entered an Order refusing to entertain the interlocutory appeals of the referral motions in the Delaware Declaratory Judgment Action, Case No. 09-4684, and the V.I. RICO Case, Case No. 09-4683, stating that the referral orders were " . . . akin

to orders transferring venue and thus are not final or otherwise appealable." *See* Pet. App. D, 23-28.

In the consolidated cases, on October 12, 2010, the Third Circuit Court of Appeals entered an Order denying the Appellants' Petition for Rehearing. *See* Pet. App. E, 29.

JURISDICTION

The Third Circuit Court of Appeals denied Appellants' September 28, 2010 Petition for Rehearing on October 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 348(a)

> (a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

11 U.S.C. § 541(a)(1)

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an

estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 544

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

18 U.S.C. § 1964(c)

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

28 U.S.C. § 157(c)

> (c)
>
> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent

> of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 1334(a), (b) & (e)

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> . . .
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
>
> > (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
> >
> > (2) over all claims or causes of action that involve construction of section 327 of title 11, United States

Code, or rules relating to disclosure requirements under section 327.

STATEMENT OF THE CASE

The Petitioners advocated that the jurisdiction of the Third Circuit Panel (the "Panel") to review the referrals of a Civil RICO Case (filed pursuant to 18 U.S.C. § 1964(c)) by the District Court of the Virgin Islands and the Delaware District Court to the Delaware Bankruptcy Court was proper under 28 U.S.C. § 1291 pursuant to the **Collateral Order Doctrine**. The Third Circuit Panel rejected the appeal holding that a referral to the Bankruptcy Court is "akin to orders transferring venue and thus are not final or otherwise appealable." App. 23.

Damages Sought:

The Petitioner's filed the V.I. RICO Case on December 7, 2008, in the Virgin Islands District Court. (D.V.I. No. 1-08-cv-00107)

The V.I. RICO Case seeks to redress damages arising from racketeering actions, including unlawful retaliation, which involve a continuing series of predicate acts and which resulted, as of the filing of the complaint, in the following damages to the Petitioners:

a. to Petitioners Jeff Prosser, Adrian Prosser, and John Raynor: damages for

"interference with the lawful employment or livelihood" pursuant to 18 U.S.C. § 1513(e) which is a predicate act under 18 U.S.C. § 1961 and cognizable under 18 U.S.C. § 1964(c) which damages therefore accrued after September 30, 2007, and with respect to Jeff Prosser, which damages accrued after his Chapter 11 Bankruptcy was converted to a Chapter 7 Bankruptcy on October 3, 2007 (the retaliatory terminations occurred on October 8, 2007); and

b. to Petitioners Jeff Prosser and Dawn Prosser: damages for the loss of the enterprise value of their ownership in the ICC Entities which damages accrued after October 8, 2007.

The Chapter 7 Trustee and the Chapter 7 Estate of Jeffrey J. Prosser:

The Chapter 7 Trustee, the Chapter 7 Estate Counsel, and the Chapter 7 Estate of Jeffrey J. Prosser are not Defendants or Plaintiffs in the V.I. RICO Case.

On March 21, 2008, a demand was made upon the Chapter 7 Trustee to join the forthcoming V.I. RICO Case. The Chapter 7 Trustee has responded in a filing that the Chapter 7 Trustee doesn't believe it is in the interest of the Chapter 7 Estate to pursue the V.I. RICO Case.

On February 16, 2009, Petitioner Jeff Prosser filed a Motion in the V.I. Bankruptcy Court, pursuant

to 11 U.S.C. § 554(b), to have the Chapter 7 Trustee abandon any claim to the cause of action in the V.I. RICO Case. To date, the Motion for Abandonment has not been decided and the Chapter 7 Trustee has responded objecting to the Motion for Abandonment while simultaneously asserting that the "Trustee does not believe those claims to be meritorious for a host of reasons, and therefore, he has not acted on them."

Delaware District Court:

On February 20, 2009, some, but not all, of the defendants named in the V.I. RICO Case filed the Delaware Declaratory Judgment Action for Declaratory Relief and an injunction for breach of contract in the Delaware District Court against all the plaintiffs in the V.I. RICO Case. Del. D.C. No. 09-00111.

On March 4, 2009, Plaintiffs in the Delaware Declaratory Judgment Action also filed a motion to refer the Delaware Declaratory Judgment Action to the Delaware Bankruptcy Court (with request for assignment to Judge Judith K. Fitzgerald). Del. D.C. No. 09-00111, DE 10. These same parties in their capacity as defendants in the V.I. RICO Case filed a motion on March 6, 2009, to refer the V.I. RICO Case to the Virgin Island Bankruptcy Court (St. Thomas and St. Johns Division – the motion requested assignment to Judge Judith K. Fitzgerald). D.V.I. 08-00107, DE 89 (the "Referral Motions").

The Delaware Declaratory Judgment Action and the Referral Motions assert that the underlying bases

for the RICO claims were settled by agreement between the plaintiffs in the Delaware Declaratory Judgment Action and the plaintiffs in the V.I. RICO Case. The settlement agreement at issue is referred to as the "2006 Settlement Agreement."

The 2006 Settlement Agreement:

The 2006 Settlement Agreement was sandwiched between the Delaware Involuntary Bankruptcy Petition filed on February 10, 2006, against Petitioner Jeffrey Prosser (and certain entities controlled by Jeffrey Prosser) by several of the Respondents and the voluntary Chapter 11 Bankruptcy Petition filed on July 31, 2006, by Petitioner Jeffrey Prosser (and certain entities controlled by Jeffrey Prosser) in the Virgin Islands Bankruptcy Court. The 2006 Settlement Agreement did contain a venue provision designating Delaware Bankruptcy Court, however, the 2006 Settlement Agreement was executed when the only pending bankruptcy petitions were in Delaware.

Bankruptcy Judge Fitzgerald entered an order on December 14, 2006, holding that venue is proper in the Virgin Islands for the Petitioner's Bankruptcy and the bankruptcy proceedings of related companies. Petitioner Jeffrey Prosser's Delaware Bankruptcy Case was closed, and the Virgin Islands Bankruptcy Court controlled all further bankruptcy proceedings since December 14, 2006.

While the 2006 Settlement Agreement purported to settle claims then existing between Petitioner

Jeffrey Prosser and several of the Defendants in the V.I. RICO Case, it has never been approved by the Bankruptcy Court, a contractual requirement set forth in the terms of the 2006 Settlement Agreement.

The Chapter 7 Court-Appointed Examiner made a demand upon the Chapter 7 Trustee to use the avoidance power pursuant to 11 U.S.C. §§ 547, 548 to set aside the 2006 Settlement Agreement.

The 2006 Settlement Agreement and documents to implement the 2006 Settlement Agreement were executed after the filing of the Delaware involuntary petition and before the filing of the Virgin Islands voluntary petition. The 2006 Settlement Agreement became effective during the ninety days before the Petitioner's voluntary bankruptcy which was during the statutory presumption of insolvency which can be avoided pursuant to 11 U.S.C. § 547(f).

There was an adversary proceeding (V.I. Case No. 08-03051) commenced by a creditor to void the 2006 Settlement Agreement when the Chapter 7 Trustee refused to heed the demand of the Court-Appointed Examiner to avoid the 2006 Settlement Agreement pursuant to 11 U.S.C. §§ 547, 548. The Bankruptcy Judge would *not* authorize the creditor or the Court-Appointed Examiner, a former bankruptcy judge, to pursue an avoidance action to set aside the 2006 Settlement Agreement; the Bankruptcy Court also ruled that Jeffrey Prosser, debtor, was estopped from seeking to set it aside.

Failure to set aside the 2006 Settlement Agreement served the interest of the creditors claiming a secured status pursuant to the 2006 Settlement Agreement while eliminating any recovery for unsecured creditors.

V.I. RICO Case:

The V.I. RICO Case involves a continuing pattern of predicate acts which are ongoing to this day.

On December 2, 2009, Petitioners filed a motion for leave to amend the Virgin Islands RICO complaint. D.V.I. No. 08-00107, DE 172. The amendment sought to augment the V.I. RICO Case with additional predicate acts including additional unlawful retaliatory acts committed after the 2006 Settlement Agreement to the date of the amendment.

On March 11, 2010, Petitioner Jeffrey Prosser's counsel was informed by the Bankruptcy Judge that the Chapter 11 Trustee (not a Defendant in the V.I. RICO Case) in a related bankruptcy (Petitioner's Bankruptcy is a Chapter 7 Bankruptcy), the Chapter 11 Estate Counsel (a Defendant in the V.I. RICO Case, as amended), the Chapter 11 Trustee's firm (a Defendant in the V.I. RICO Case, as amended), the Chapter 7 Trustee (not a Defendant in the V.I. RICO Case), the Chapter 7 Estate Counsel (not a Defendant in the V.I. RICO Case), and counsel for the Respondent National Rural Utilities Cooperative Finance Corporation ("CFC") and Rural Telephone Finance Cooperative ("RTFC") were referred to the United

States Attorney for criminal investigation pursuant to 18 U.S.C. § 3057(a).

Discovery emanating from an evidentiary hearing requested by Jeffrey Prosser, and ordered by the Virgin Islands District Court on January 29, 2010, and also from proceedings to approve the sale of assets in a related Chapter 11 Bankruptcy has unearthed additional crimes directed at Petitioner Jeffrey Prosser which accrued after, and were discovered after, the 2006 Settlement Agreement which mandate further amendment of the V.I. RICO Case which, as of this date, have not been made.

Referral Proceedings – Proceedings Below:

On August 7, 2009, the Delaware District Court ordered referral of the Delaware Declaratory Judgment Action to the Delaware Bankruptcy Court. (The "Delaware Referral Order.") *See* App. 1-11.

On August 21, 2009, Petitioners filed a motion for reargument seeking reconsideration and reversal of the Delaware Referral Order.

On December 1, 2009, the Delaware District Court denied Petitioners' Motion for Reargument. *See* App. 12-18.

On December 8, 2009, the Virgin Islands District Court ordered referral of the V.I. RICO Case to the Virgin Islands Bankruptcy Court, St. Thomas and St. John Division, which case has been assigned to Judge Fitzgerald. D.V.I. No. 08-00107, DE 176. *See*

App. 19-22. The Virgin Islands District Court Order anticipated the further referral to the Delaware Bankruptcy Court stating to wit: "The Movants state that once this matter is referred to Judge Fitzgerald, they shall immediately petition for the case to be referred to the Delaware Bankruptcy Court." *See* App. 20. Despite timely appeal of the Virgin Islands District Court referral of the V.I. RICO Case to the Virgin Islands Bankruptcy Court, the Virgin Islands Bankruptcy Court asserted jurisdiction and, on motion, referred the case to the Delaware District Court. The Delaware District Court subsequently referred the V.I. RICO Case to the Delaware Bankruptcy Court, Judge Fitzgerald, hence, both the V.I. RICO Case and the Delaware Declaratory Judgment Action are both assigned to Judge Fitzgerald in the Delaware Bankruptcy Court. Motion arguments are scheduled for January 2011.

After timely appeals filed in the District Courts of the Virgin Islands and Delaware, and briefing of the issue of interlocutory appeal, the Third Circuit entered an order holding that "[T]he District Court August 7, 2009 and December 8, 2009 orders transferring the District Court cases to the bankruptcy court are akin to orders transferring venue and thus are not final or otherwise appealable." *See* App. 23.

Petitioners timely filed a Petition for Rehearing was denied on October 12, 2010 on a procedural basis. *See* App. 29.

The Delaware Declaratory Judgment Action has been referred to the Delaware Bankruptcy Court and assigned to Judge Fitzgerald. Delaware Bankruptcy Court adversary case numbers assigned to the Motions are 09-52854 and 10-50744.

Synopsis: Petitioners' Argument:

Petitioners respectfully submit that:

a. There is no basis to conclude that the outcome of the V.I. RICO Case will have an effect on the estate of the debtor, and therefore, the Delaware Bankruptcy Court has no subject matter jurisdiction;

b. The Delaware Bankruptcy Court has no subject matter jurisdiction because "related to" jurisdiction in a Chapter 7 Case is construed more narrowly than "related to" jurisdiction in a Chapter 11 Case;

c. The parties to the 2006 Settlement Agreement cannot confer subject matter jurisdiction upon the Delaware Bankruptcy Court;

d. The Chapter 7 Trustee has used his position to protect unsecured creditors masquerading as secured creditors by not setting aside the 2006 Settlement Agreement and, through other actions, frustrates the Federal Public Policy supporting private attorneys general acting pursuant to the policy goals of the RICO Act;

e. The Petitioners in the V.I. RICO Case are pursuing legal claims and are entitled to adjudication of their claims by an Article III Court and a jury;

f. There is no Bankruptcy Court jurisdiction over three of four Petitioners; and

g. The Third Circuit's analogy to venue orders to avoid the appeal is misplaced and plain error because the Delaware Bankruptcy Court is operating without lawful jurisdiction which, independent of the appeal, is a traditional use of a mandamus.

"Related to" jurisdiction is a legal matter which still confounds practitioners and courts alike which results in conflicting decisions meriting the attention of this Court.

REASONS FOR GRANTING THE PETITION

Bankruptcy Courts' "related to" jurisdiction (28 U.S.C. § 157(c)) has long been a problem that perplexes practitioners and courts alike; this Court acknowledged as much in the 1995 landmark decision in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which involved "related to" jurisdiction. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308, n.5 (1995). As an indication of the complexity of the issue, *Marathon* resulted in four separate opinions with the plurality represented by two opinions. One law review article has stated: " . . . it is difficult

to read the *Marathon* opinion without concluding that all of the justices believe that 'related to' jurisdiction *does* fall within the bounds of Article III." *See Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction* by Radha A. Pathak, 85 Or. L. Rev. 59, 81 (2006).

Upon examination of the V.I. RICO Case, there is NO factual basis to support "related to" jurisdiction by either the Virgin Islands (V.I.) Bankruptcy Court or the Delaware Bankruptcy Court since the Chapter 7 Estate is a not a defendant and is not a plaintiff, and further, the successful prosecution of the case and recovery will neither increase nor decrease the Chapter 7 Estate. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 309, n.6 (1995). (But whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor.) Additionally, Petitioner Jeffrey Prosser's damages (which Respondents assert are barred by the 2006 Settlement Agreement) accrued long after the date of the 2006 Settlement Agreement, based upon acts which occurred after the 2006 Settlement Agreement and after the commencement of his Chapter 11 Case on July 31, 2006. In fact, his damages accrued after his Chapter 11 Bankruptcy was converted to a Chapter 7 Bankruptcy on October 3, 2007. Hence, his damages are not property of the Chapter 7 Estate. Petitioners and non-debtors Dawn Prosser, Adrian Prosser and John Raynor (counsel herein) are NOT debtors and their damages accrued long after the date of the 2006

Settlement Agreement and after the conversion of Jeffrey Prosser's voluntary Chapter 11 Bankruptcy to Chapter 7.

This Court has noted that Bankruptcy Courts "related to" jurisdiction is limited. *See Celotex Corp. v. Edwards,* 514 U.S. 300, 308 (1995) (We also agree [with the Third Circuit] that court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.) "Related to" jurisdiction is construed more narrowly when, as here, a reorganization is **not at issue**. *See Celotex Corp. v. Edwards,* 514 U.S. 300, 308 (1995) (. . . it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bankruptcy courts may extend more broadly in the former case than in the latter.) For reasons discussed herein, Petitioners submit that it is important that this Court provide the illumination of jurisdictional limitation in a Chapter 7 Bankruptcy: a liquidation proceeding.

Also, as described hereinafter, the Federal Public Policy behind the enactment of the civil remedy in the Racketeer Influenced and Corrupt Organizations Act (RICO Act) of encouraging private attorneys general is being held hostage by the Chapter 7 Trustee which augments the importance of the issues presented by this case.

Petitioners submit that oddly, unlike any previous case which considered "related to" jurisdiction, the District Court's referrals are ultimately to the

Delaware Bankruptcy Court which, by reason of the referrals, is exercising "related to" jurisdiction **without a bankruptcy proceeding to which the case is related**. As elaborated below, it is well established that the Delaware Bankruptcy Court in these circumstances has no jurisdiction since the *pending* bankruptcy case, *i.e.*, the Chapter 7 Case, has been located in the V.I. Bankruptcy Court since December 14, 2006. Thus, the Third Circuit's analogy in denying the appeal to a venue decision is misplaced when the Delaware Bankruptcy Court has no jurisdictional basis for the exercise of "related to" jurisdiction. In fact, a mandamus action is proper in these circumstances because the Delaware Bankruptcy Court has no lawful jurisdiction. *See Will v. United States*, 389 U.S. 90, 95-96 (1967); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). To the extent that the District Courts' referrals in this case authorize the Delaware Bankruptcy Court to exercise jurisdiction over a suit that is not related to a bankruptcy proceeding in Delaware, such referrals violate the precepts of *Marathon*, *supra* and duty of the District Court to adjudicate suits properly before it.

Also, the Constitutional right to a jury trial conflicts with the District Courts' referrals.

Clearly, this case, if accepted, will help define the scope of the "related to" jurisdiction of an Article I Court thus shedding light on a subject matter which in the case of this Court's decisions regarding Bankruptcy Court jurisdiction seem to always draw dissenting opinions. Jurisprudence policy goals of

evenhanded, predictable, and consistent development of legal principles are better served by addressing important issues of "related to" jurisdiction by Article I Courts in a Chapter 7 Case.

Irregular Proceedings:

Even though "related to" bankruptcy jurisdiction is fertile ground for disagreement, this case would not be presented to this Court but for highly irregular proceedings. First, over Petitioners' protest, an affirmative defense to some of the allegations of the V.I. RICO Case has been cast as a declaratory judgment action in a District Court in a different jurisdiction (Delaware). The Delaware District Court disregarded the first-file rule. Second, an agreement that may serve as a defense to some but not all of the predicate acts (only if bankruptcy standing trumps considerations of 18 U.S.C. § 1951 and 15 U.S.C. § 78cc(b)) is controlling the venue of the V.I. RICO Case, a case which stands on its merits even if the 2006 Settlement Agreement is declared effective against relief for all acts occurring as of its execution date. Third, the Third Circuit refused to consider whether the Bankruptcy Court is acting beyond the scope of its jurisdiction by treating appeals of the referral orders as non-appealable, interlocutory orders. With the foregoing irregularities, this proceeding has a supervisory perspective to it. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) (This Court has supervisory authority over the federal courts.)

Private Attorneys General:

The V.I. RICO Case involves a cause of action in which the Chapter 7 Estate is neither a defendant nor a plaintiff. RICO provides for **treble-damages remedy** in civil actions. *See* 18 U.S.C. § 1964(c). The Supreme Court has recognized that the purpose of treble damages in the RICO Act is to encourage private attorneys general. *See Rotella v. Wood*, 528 U.S. 549, 557 (2000) (The Clayton Act and RICO share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity.) Federal Public Policy is ascertainable from statutes, treaties, Constitution, etc. of the United States. *See Muschany v. United States,* 324 U.S. 49, 66 (1945) (Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.) There are important public policy goals behind the RICO Act which act incorporates provisions of another remedial act implicated by the V.I. RICO Case, SOX § 1107 (18 U.S.C. § 1513(e)), the plain language of which is broad and very far reaching.

The diversion of the V.I. RICO Case to an Article I Court which by statute, 28 U.S.C. § 157(c), can only **advise** the District Court, stymies and frustrates the Petitioners by creating unnecessary procedural

hurdles, delays and costs, thereby discouraging prosecution of the case by the Petitioners as private attorneys general. The referrals are diametrically opposed to the Public Policy of the United States as reflected in the RICO Act.

In Rem and the Bankruptcy Court's Jurisdiction:

28 U.S.C. § 1334(e) states: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction. . . ." The court which has *in rem* jurisdiction has the right to exercise jurisdiction. *See New Haven Inclusion Cases*, 399 U.S. 392 (1970) (The court that first takes over the res, draws to itself power to determine all claims upon it.) This power or basis for jurisdiction, derived from the exclusive possession of property wherever situated, is and has always been interpreted as the court currently exercising *in rem* jurisdiction. *See Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77 (1923) (Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts.)

The Chapter 7 Estate of Jeffrey J. Prosser is within the exclusive jurisdiction of the V.I. Bankruptcy Court pursuant to the December 14, 2006 Venue Order entered by the Bankruptcy Judge which

was not appealed. The Delaware Bankruptcy Court has no *in rem* jurisdiction.

The 2006 Settlement Agreement cannot confer jurisdiction on the Delaware Bankruptcy Court. *See Whitman v. DOT*, 547 U.S. 512 (2006) (Parties, of course, cannot confer jurisdiction; only Congress can do so.) It is black letter law that parties cannot confer subject matter jurisdiction.

The District Courts' Referral Orders cannot create jurisdiction in the Delaware Bankruptcy Court when no jurisdiction exists by relying upon an agreement of private parties. Thus, the Delaware Bankruptcy Court is acting without lawful jurisdiction which, if the appeal is not proper, would entitle the Petitioners to the extraordinary relief afforded by a Writ of Mandamus. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. . . .)

The District Courts' Referral Orders violate several fundamental precepts involving subject matter jurisdiction. The Third Circuit cannot designate the Referral Orders as interlocutory to avoid the examination of issues involving subject matter jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186, 211 (1977) (Moreover, when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding

the jurisdictional question may be the sacrifice of "fair play and substantial justice.") Fair play and substantial justice has been denied by the failure of the Third Circuit to address this issue. The Third Circuit abuses its discretion by declining to hear the appeals.

Beyond the Outer Boundaries of "Related to" Jurisdiction:

This Court's decision which involved "related to" jurisdiction in the context of a potential reorganization was *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, n.5 (1995). That decision drew the dissent of two Justices which included, as one ground of their dissent, that "the fact that the challenged injunction was issued by a non-Article III judge." 514 U.S. at 314. The distinguishing factors of this case from the facts in *Celotex Corp.* are:

a. The judgment in *Celotex Corp.* was against the Debtor, Celotex Corp. whereas in this case there is no judgment against the Chapter 7 Estate;

b. Celotex Corp. was in a Chapter 11 Bankruptcy eligible for reorganization, whereas in this case, the claimed "related to" bankruptcy proceeding is a Chapter 7 Liquidation;

c. The execution against the supersedeas bond submitted for the benefit of the debtor, Celotex Corp., apparently would have resulted in subrogation liability against the debtor, whereas in this case, the success of

> the litigation will neither increase nor decrease the Chapter 7 Estate; and
>
> d. Most importantly, in *Celotex Corp.* there was a Bankruptcy Court Injunctive Order prohibiting the execution against the supersedeas bond, whereas in this case, there is no Bankruptcy order at issue.

In this case, the Chapter 7 Trustee is acting for the benefit of secured creditors who are afforded the status of secured creditors only because of the 2006 Settlement Agreement. The Chapter 7 Trustee did not seek to avoid the 2006 Settlement Agreement notwithstanding a demand to do so by the Chapter 7 Court-Appointed Examiner, while at the same time, the Chapter 7 Trustee would not (i) join the V.I. RICO Case, (ii) negotiate an interest in the proceeds of the V.I. RICO Case or (iii) abandon any claim to the proceeds of the V.I. RICO Case. The Chapter 7 Trustee seemingly desires that the causes of action in the V.I. RICO Case become stale which frustrates Federal Public Policy encouraging private actions.

The fact that in this case the alleged "related to" estate is in a Chapter 7 proceeding in contrast to a Chapter 11 proceeding as in *Celotex Corp.* is sufficient to conclude that there is no "related to" jurisdiction. *See Celotex Corp. v. Edwards,* 514 U.S. 300, 308 (1995) (. . . it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bankruptcy courts may extend more broadly in the former case than in the latter.) Further, the V.I. RICO

Case is not a collateral attack on *any* Bankruptcy Court Order.

It is clear that *Celotex Corp.*, *supra*, supports the Petitioners' position that there is no Bankruptcy Court "related to" jurisdiction over the V.I. RICO Case. The Third Circuit venue analogy and assertion that the appeals are interlocutory **is error** as it approves the Bankruptcy Court operating beyond its lawful jurisdiction.

The V.I. RICO Case Is Not Property of the Estate:

The V.I. RICO Case is not property of the estate within the meaning of 11 U.S.C. § 541 because the damages referred to therein accrued to each of the Petitioners after the commencement of the voluntary Chapter 11 Bankruptcy Case on July 31, 2006, and further, after the conversion to a Chapter 7 proceeding on October 3, 2007.

The "commencement of a case" language of the statute as well as case law establish that the Estate is determined as of the date of filing the petition – an Order for Order. *See In re FCX, Inc.*, 853 F.2d 1149 (4th Cir. 1988) (Estate under 11 U.S.C. § 541(a) succeeds only to those interests that debtor has in property to commencement of bankruptcy case.) If there is any question on the accrual of damages, then 11 U.S.C. § 348 makes it clear that property of the estate is in fact determined as of date of the Chapter 11 filing on July 31, 2006, and not when the Chapter

11 was converted to Chapter 7, *i.e.*, October 3, 2007. A bankruptcy treatise states:

> Related to the exemption question is the question of exactly what property becomes property of the estate in the converted case. In general, *sections 348* and *541 of the Bankruptcy Code* provide the answer by indicating that **the date of the commencement of the case is not changed by conversion** and that property of the estate is measured as of the commencement of the case. **Thus, any property obtained after commencement but before conversion remains the debtor's after conversion.**

See 9-1019 Collier on Bankruptcy-15th Edition Rev. P 1019.11 (Bold added).

There is no question that the damages experienced by Petitioners Jeffrey Prosser and Dawn Prosser accrued after July 31, 2006. Further, the cause of action accrued after the conversion of the estate to a Chapter 7 Estate on October 3, 2007.

Further the Chapter 7 Trustee is holding the V.I. RICO Case hostage. First, notwithstanding the demand of the Court-appointed examiner, the Chapter 7 Trustee refused to set aside, *i.e.*, void, the 2006 Settlement Agreement pursuant to 11 U.S.C. §§ 547, 548. The Bankruptcy Examiner, a former Bankruptcy Judge, described the avoidance action to set aside the 2006 Settlement Agreement as " . . . not only colorable, it is an action for which summary judgment relief in favor of the estate is appropriate." Case

3:08-ap-03051-JKF Doc 23, filed 12/10/08, p.16. The Bankruptcy Judge would not allow the Examiner or any other party to pursue the timely filed avoidance action (Case 3:08-ap-03051-JKF, Doc 1, filed 10/02/08) even though the Chapter 7 Trustee refused. By his refusal to avoid the 2006 Settlement Agreement, the Chapter 7 Trustee allows it to stand (as claimed by Respondents) as a barrier to the Virgin Islands RICO Case. The standing requirements unique to bankruptcy proceedings coupled with "related to" jurisdiction are being used to stymie an action by private attorneys general acting pursuant to Public Policy.

In addition, to the extent the 2006 Settlement Agreement is relevant to the Virgin Islands RICO Case claims, and the Chapter 7 Trustee's refusal to avoid the 2006 Settlement Agreement is relevant to these proceedings, the following is relevant to the analysis:

> a. In this case, *if* the Chapter 7 Trustee had an interest in the V.I. RICO Case, presumably, in the exercise of the Trustee's fiduciary duty, the Trustee has decided NOT to pursue the cause of action; and
>
> b. Explicitly, pursuant to 11 U.S.C. § 554(c), a cause of action not pursued by the Trustee reverts to the Debtor when the estate closes.
>
> The "Legal Neverland" is the time between:
>
> – when it is apparent that the Chapter 7 Trustee has no intent of pursuing the cause

> of action or to negotiate an interest in the cause of action and allow the Debtor at his own expense to pursue the cause of action; and
>
> – when the cause of action has reverted to the Debtor because the estate has closed.

This Legal Neverland should not and cannot serve as a basis for "related to" jurisdiction. Without an interest in the V.I. RICO Case by the Chapter 7 Estate, there can be no basis for "related to" bankruptcy jurisdiction. The District Courts' Referral Orders are without any sound legally cognizable foundation for "related to" jurisdiction. Therefore, an Article I Court is operating outside its jurisdiction and thereby denying Petitioners an Article III Court. The Third Circuit analogy is misplaced: a change in venue between two Article III Courts which each have subject matter jurisdiction cannot be likened to a transfer of a case from an Article III Court, wherein plaintiffs are entitled to a jury trial, to an Article I Court which has no subject matter jurisdiction.

The Petitioners' V.I. RICO Case is Entitled to Jury Trial by an Article III Court:

Notwithstanding being deemed as acting as private attorneys general pursuant to the RICO Act, Petitioners are seeking legal damages involving a matter of **private right** and thus, are entitled to a jury trial. *See Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) (*U.S. Const. amend. VII* protects a litigant's

right to a jury trial only if a cause of action is legal in nature and it involves a matter of private right.) Petitioners' statutory right to seek redress for **their** damages arises under 18 U.S.C. § 1964(c) which provides that: "Any person injured in his business or property by reason of a violation of section 1962 [18 U.S.C. § 1962] of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, ..." In essence, the RICO remedy allows the Petitioners recovery for their damages (and not damages which may have accrued to others) occurred by reason of the Respondents participating in prohibited activities, 18 U.S.C. § 1962, which requires a pattern of activities violating 18 U.S.C. § 1961(1).

The entitlement to a jury trial was described by this Court as follows:

> "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull v. United States*, 481 U.S. 412, 417-418 (1987) (citations omitted). The second stage of this analysis is more important than the first.

See Granfinanciera, 492 U.S. at 42.

Many courts, in RICO cases, delve into the issue of whether an underlying prohibited predicated act

mirrors legal causes of action that existed in the 18th-century: *i.e.*, *NSC International Corp. v. Ryan*, 531 F. Supp. 362, 363-364 (N.D. Ill. 1981) where the Court undertook a Seventh Amendment analysis to determine whether civil actions brought pursuant to 18 U.S.C. § 1964 and determined that the parties had a right to trial by jury. In this case, Petitioners Dawn Prosser's and Jeffrey Prosser's damages for their loss of the enterprise value of businesses formerly owned Mr. and Mrs. Prosser and destroyed as a consequence of a series of post-2006 predicate acts satisfies this test. Nevertheless, the damages sought by Petitioners Jeffrey Prosser, Adrian Prosser and John Raynor for unlawful retaliation (pursuant to 18 U.S.C. § 1513(e)) that interferes with "the lawful employment or livelihood," a predicate act pursuant to 18 U.S.C. § 1961(1), are not based upon 18th-century causes of action.

This Court has stated that the "second stage of this analysis is more important than the first." *Granfinanciera*, 492 U.S. at 42. To hold otherwise is to determine that Congress cannot create new rights that are endowed with the right to a jury trial pursuant to *U.S. Const. amend. VII*.

In a RICO context, the Circuit Court of Appeals for District of Columbia addressed back-pay due pursuant to the Employee Protection Program acknowledging that claim, like wrongful discharge, was not recognized in the 18th-century. *See Crocker v. Piedmont Aviation*, 49 F.3d 735, 746 (D.C. Cir. 1995) (Whether or not this analogy is apt, it fails for our

purposes because the tort of wrongful discharge is a creature of the twentieth century, not the eighteenth.) The Circuit Court examined the statute under this Court's guidelines to determine whether the action was legal, thereby entitling a party to jury trial, or whether the statutory right was equitable. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558 (1990). In *Terry* this Court established two exceptions to the general rule that a suit for lost wages is equitable in nature, to wit:

> a. Are the monetary damages "restitutionary, such as in 'action[s] for disgorgement of improper profits.'" *See Terry,* 494 U.S. at 570.
>
> b. Are the monetary awards "incidental to or intertwined with injunctive relief" which may be equitable. *See Terry,* 494 U.S. at 571.

Based upon *Terry*, *supra*, the Fourth Circuit concluded that the statutorily created relief in the Employee Protection Program for damages was legal in nature and not equitable, to wit:

> On the other hand, where a statute does not explicitly describe money damages as equitable, or where the imposition of such damages is not a matter of equitable discretion once a defendant's violation is proven, the Court has characterized the relief as legal and required a jury trial. See *Lorillard, 434 U.S. at 584* (noting that the ADEA "incorporates the FLSA provision that

> employers "shall be liable' [for wage deficiencies], while under Title VII, the availability of backpay is a matter of equitable discretion"; jury trial therefore available); *Curtis, 415 U.S. at 197* (holding jury trial available for Title VIII money damages claim; "There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount."). Similarly, where the power to award money damages is not merely derivative of the court's authority to enjoin statutory violations but rests on a "separate and distinct statutory provision," the award of damages will not be considered "incidental to or intertwined with" equitable relief. *Tull v. United States, 481 U.S. at 425.*

See Crocker v. Piedmont Aviation, 49 F.3d 735, 749 (D.C. Cir. 1995).

While in *Crocker, supra*, there was "no statutory provision whatever creating the cause of action or identifying the available remedies" (49 F.3d at 749), in this case, 18 U.S.C. § 1964(c) creates a cause of action and further, provides for legal damages " . . . in threefold the damages . . . [Petitioners] sustains and the cost of the suit." While 18 U.S.C. § 1964(a) allows for injunctive relief, 18 U.S.C. § 1964(c) allows for legal damages which are not derivative of the injunctive power because legal damages rest upon a "separate and distinct statutory provision." There is no requirement to pursue an injunctive action to obtain damages pursuant to 18 U.S.C. § 1964(c).

The Fifth Circuit in a 1984 case held that it was error in a RICO case for the Trial Judge not to submit to a jury the issue of treble damages even though the Fifth Circuit approved restitution (equitable) as the measure of damages. *See Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160 (5th Cir. 1984) (The injury alleged by Alcorn County in this case, including unauthorized purchases at inflated prices, procured by bribery and threats, and payment for goods never received, falls within the scope of a civil RICO action.) The Fifth Circuit held: "The district court, therefore, erred in refusing to submit the issue of damages under 18 U.S.C. § 1964(c) to the jury." *Alcorn County*, 731 F.2d at 1169.

Petitioners can only seek damages they sustained and derived from the defendants' commission of specific acts: predicate acts as set forth in 18 U.S.C. § 1961(1). Thus, a RICO suit seeks to enforce a statutory created "private right" for "legal damages." To encourage private citizens to serve as private attorneys general, Congress trebled their legal damages. Though serving as private attorneys general, plaintiffs in RICO cases cannot obtain damage awards for third parties that suffer as a result of the subject racketeering activities. Nor can private plaintiffs seek damages for the benefit of the government such as under the False Claims Act. RICO cases are the enforcement of private rights that serve the greater public good. As private right, the V.I. RICO Case cannot be referred by an Article III Court to an Article I Court. *See Granfinanciera v. Nordberg*, 492 U.S.

33 (1989) (But Congress lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.)

Other Considerations:

Bankruptcy jurisdiction is derived from possession over property: *in rem* jurisdiction. "Related to" jurisdiction exists to encompass disputes which may affect that property when jurisdiction is premised upon possession of property. Nevertheless, "related to" jurisdiction is not unlimited, to wit:

> The bankruptcy power unquestionably gives the Commission and court, working within the framework of the Act, full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that may be asserted against it. These rights may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company, subject to the requirements of the Act. The purchase of formerly leased properties does not involve rights asserted against the debtor, however. This Court has said that "The exclusive jurisdiction granted the reorganization court by § 77(a) is that which bankruptcy courts have customarily possessed." *Meyer v. Fleming*, 327 U.S. 161, 164 (1946). **We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers**

> **not justified by any provisions of the Bankruptcy Act.**

See Callaway v. Benton, 336 U.S. 132, 147-148 (1949) (Emphasis added and footnotes omitted).

This Court held that the Bankruptcy Court had NO jurisdiction over the internal affairs of a non-debtor lessor that had a direct contractual relationship with the Bankruptcy Estate in circumstances where the lessor's approval or non-approval of a lease would affect a reorganization – when "related to" jurisdiction is the broadest. Likewise, the Third Circuit concluded in a case involving a 100% penalty (for not paying taxes withheld) pursuant to 26 U.S.C. § 6672 assessed against both the debtor, Quattrone Accountants, Inc., and the debtor's principal officer, Philip P. Quattrone, that there was no "related to" jurisdiction over Philip P. Quattrone, to wit:

> Thus, under *Section 6672*, Philip Quattrone's liability to the IRS is entirely separate and distinct from debtor's liability to the IRS under *Section 6672*, even though such potential liability stems from the same withholding taxes. Although the policy of the IRS is to not collect more than 100% of the taxes owed, *see United States v. Sotelo, 436 U.S. 268, 279-80, n.12, 98 S. Ct. 1795, 56 L. Ed. 2d 275 (1978)*, each person responsible under *Section 6672* is liable for that 100%.

See Quattrone Accountants v. IRS, 895 F.2d 921, 926-927 (3d Cir. 1990) (Footnote omitted)

It must be emphasized that three of the Petitioners relegated to the Bankruptcy Court are not debtors in the bankruptcy proceeding. There is no "related to" jurisdiction over non-debtors; a fact emphasized to and ignored by the District Courts and the Third Circuit.

Given the prior history, with respect to damages related to the Enterprise Value, if the Chapter 7 Trustee later asserted an interest in any recovery, it would become the subject matter of another adversary proceeding. The possible further claim is not a basis for "related to" jurisdiction. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984) (The fact remains that any judgment received by the plaintiff Higgins could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.)

Congress has one policy in the RICO Act, to encourage private attorneys general, while District Courts have another, to clear their dockets. The V.I. RICO Case was properly placed before the Virgin Islands District Court. The V.I. District Court has a duty to adjudicate the V.I. RICO Case. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (We noted that . . . the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them.") The District Court cannot avoid its obligation by relegating the V.I. RICO Case to a Bankruptcy Court. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-662 (1978) (There can

be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ "in order that [it] may exercise the jurisdiction of review given by law." *Insurance Co. v. Comstock*, 16 Wall. 258, 270 (1873)) By allowing a jurisdictional clause in the 2006 Settlement Agreement, an affirmative defense, to determine subject matter jurisdiction over a much broader and comprehensive RICO action, the District Courts are avoiding adjudication of a case properly placed before the V.I. District Court.

CONCLUSION

There is no "related to" jurisdiction by the Delaware Bankruptcy Court. An appeal of the District Court Referral Orders to a court without subject matter jurisdiction is proper under 28 U.S.C. § 1291 pursuant to the **Collateral Order Doctrine**. *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (The Collateral Order Doctrine involves a small class of cases which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.) The unlawful exercise of subject matter jurisdiction by the Bankruptcy Court will never be reviewed because 28 U.S.C. § 157(c) forces the District Court to review the merits of the Bankruptcy Court's decisions making the jurisdictional issue

raised herein moot. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (To come within the "small class" of decisions excepted from the final-judgment rule, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of an action, and be effectively unreviewable on appeal from a final judgment.) The District Courts cannot avoid their duty to litigate matters properly before them by referring the matter to a court with NO jurisdiction. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (Federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. Federal courts have a virtually unflagging obligation to exercise the jurisdiction given them.) It was error of the Third Circuit to refuse appeal of a matter involving the unlawful exercise of subject matter jurisdiction where it would be proper for Petitioners to have sought a mandamus. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. . . .).

Further, Petitioners are entitled to a jury trial and the District Court Referral Orders coupled with the Third Circuit's error in refusing to accept the appeal relegates to an Article I Court an action which has strong Public Policy considerations. Referral of an action in which parties are entitled to a right of jury trial from an Article III Court to an Article I Court is

not analogous to transfer of venue from an Article III Court to another Article III Court.

Acceptance of this Writ will help bring policy goals of evenhanded, predictable, and consistent development of legal principles concerning a Bankruptcy Court's exercise of "related to" jurisdiction, an area where uncertainty reigns.

WHEREFORE, for the foregoing reasons the Petitioners pray that this Court accept this Writ of Certiorari.

Respectfully submitted,

JOHN P. RAYNOR
Counsel of Record for All Petitioners
10110 Nicholas Street, Ste. 102
Omaha, NE 68114
Ph: 402-498-4400
JRaynor@rrplawyers.com
Pro Se

NORMAN A. ABOOD, ESQ.
152 North Summit Street
Toledo, OH 43604
Ph: 419-724-3700
Attorney for Jeffrey J. Prosser

JEFFREY B. C. MOORHEAD, ESQ.
1132 King Street, Ste. 3
Christiansted, VI 00820
Ph: 340-773-2539
Attorney for Dawn Prosser & Adrian Prosser

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 29, 2010
DCO-152

No. 09-4683

JEFFREY J. PROSSER, et al., Appellants
v.
NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, et al.
(D.V.I. No. 1-08-cv-00107)

No. 09-4684

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, et al.
v.
JEFFREY J. PROSSER, et al., Appellants
(Del. D.C. No. 1-09-cv-00111)

Present: FUENTES, JORDAN and HARDIMAN, *Circuit Judges.*

1. Submitted by Clerk's Order for possible dismissal.

2. Answer by Appellees.

3. Answer by Appellants.

/s/ Anthony Infante
Anthony Infante
Case Manager 267-299-4916

ORDER

Generally, this Court may hear appeals only from final orders. *See* 28 U.S.C. § 1291. The decision must be final as to all causes of action and all parties. *Andrews v. United States,* 373 U.S. 334, 340 (1963). Orders granting motions to transfer venue are not final or immediately appealable. *In re Federal Mogul Global, Inc.,* 300 F.3d 368, 378 (3d Cir. 2002) (internal quotations and citations omitted); *Hershey Foods Corp. v. Hershey Creamery Co.,* 945 F.2d 1272, 1278 (3d Cir. 1991) (citation omitted). The District Court August 7, 2009 and December 8, 2009 orders transferring the District Court cases to the bankruptcy court are akin to orders transferring venue and thus are not final or otherwise appealable. Accordingly, the appeals are dismissed for lack of jurisdiction. Because Appellants are unable to show that their right to a writ of mandamus is "clear and indisputable," the request for mandamus relief is also denied. *See In re Nwanze,* 242 F.3d 521, 524 (3d Cir. 2001) (party must show there are "no other adequate means to attain the desire relief" and that "the right to the writ is clear and indisputable.").

By the Court,

/s/ Thomas M. Hardiman
Circuit Judge

Dated: August 30, 2010

SLC/cc: Norman A. Abood
Stephen M. Baldini
William P. Bowden

James P. Bowden
James P. Chou
Jamison A. Diehl
Craig A. Hoover
Richard H. Hunter
Adam K. Levin
Michael A. Lindsay
Jeffrey B. Moorhead
Robert G. Newman
Karen B. Skomorucha
Matthew P. Ward

[SEAL]

A True Copy

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

APPENDIX B

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: wwww.ca3.uscourts.gov

MARCIA M. WALDRON
CLERK

TELEPHONE
215-597-2995

August 30, 2010

Norman A. Abood
152 North Summit Street
Suite 203
Toledo, OH 43604

Stephen M. Baldini
Akin, Gump, Strauss, Hauer & Feld
One Bryant Park
New York, NY 10036

John H. Benham III
Law Office of John H. Benham, P.C.
P.O. Box 11720
Charlotte Amalie, Saint Thomas
USVI

William P. Bowden
Ashby & Geddes
500 Delaware Avenue
P.O. Box 1150, 8th Floor
Wilmington, DE 19899

James P. Chou
Akin, Gump, Strauss, Hauer & Feld
One Bryant Park
New York, NY 10036

Jamison A. Diehl
Akin, Gump, Strauss, Hauer & Feld
One Bryant Park
New York, NY 10036

J. Daryl Dodson
Moore, Dodson & Russell
5035 (14A) Norre Gade
P.O. Box 310
Charlotte Amalie, St. Thomas, VI 00802

Craig A. Hoover
Hogan Lovells US
555 Thirteenth Street, NW
Columbia Square
Washington, DC 20009-1109

Richard H. Hunter
Hunter, Cole & Bennett
1138 King Street, Suite 301
Christiansted, St. Croix
USVI

Adam K. Levin
Hogan Lovells US
555 Thirteenth Street, NW
Columbia Square
Washington, DC 20009-1109

Michael A. Lindsay
Dorsey & Whitney
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402-0000

Jeffrey B. C. Moorhead
1132 King Street
Suite #3
Christiansted, VI 00820

Robert G. Newman
Fulbright & Jaworski
Suite 2200
300 Convent & Jaworski
San Antonio, TX 78205

James K. Nichols
Dorsey & Whitney
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402-0000

John P. Raynor
Raynor, Rensch & Pfeiffer
Suite 102
10110 Nicholas Street
Omaha, NE 68114

Lawrence H. Schoenbach
111 Broadway
The Trinity Building
Suite 1305
New York, NY 10006-0000

Karen B. Skomorucha
Ashby & Geddes
500 Delaware Avenue
P.O. Box 1150, 8th Floor
Wilmington, DE 19899

Matthew P. Ward
Womble, Carlyle, Sandridge & Rice
222 Delaware Avenue
Suite 1501
Wilmington, DE 19801-0000

RE: Prosser, et al v. Natl Rural Util Coop Fin Corp, et al
Case Number: 09-4683
District Case Number: 1-08-cv-00107

ENTRY OF JUDGMENT

Today, **August 30, 2010** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment

45 days after entry of judgment in a civil case if the United States is a party

Page Limits:

15 pages

Attachments:

A copy of the panel's dispositive order only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

By: Case Manager/slc
267-299-4959

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 09-111-SLR
JEFFREY PROSSER, *et al.*,	)	
Defendants.	)	

Richard L. Horwitz, Esquire, and Suzanne M. Hill, Esquire, of Potter Anderson & Corroon LLP, Wilmington, Delaware. Counsel for Plaintiffs National Rural Utilities Cooperative Finance Corporation, Rural Telephone Finance Cooperative, Sheldon C. Petersen, John J. List, Steven L. Lilly, and R. Wayne Stratton. Of Counsel: Craig A. Hoover, Esquire, Adam K. Levin, Esquire, and Melissa N. Henke, Esquire, of Hogan & Hartson LLP, Washington, D.C. William P. Bowden, Esquire, and Karen B. Skomorucha, Esquire, of Ashby & Geddes, P.A., Wilmington, Delaware. Counsel for Plaintiff Fulbright & Jaworski L.L.P. Of Counsel: Robert G. Newman, Esquire, of Fulbright & Jaworski L.L.P., San Antonio, Texas, and Richard H. Hunter, Esquire, of Hunter Cole & Bennett, Christiansted, St. Croix, United States Virgin Islands. Matthew P. Ward, Esquire, of Womble Carlyle Sandridge & Rice,

PLLC, Wilmington, Delaware. Counsel for Plaintiffs Greenlight Capital, Inc., Greenlight Capital Qualified, L.P., Greenlight Capital, L.P., and Greenlight Capital Offshore, Ltd. Of Counsel: Richard B. Zabel, Esquire, James P. Chou, Esquire, and Jamison A. Diehl, Esquire, of Akin Gump Strauss Hauer & Feld LLP, New York, New York.

Lisa C. McLaughlin, Esquire, of Phillips, Goldman & Spence, P.A., Wilmington, Delaware, and Norman A. Abood, Esquire, Toledo, Ohio. Counsel for Defendant Jeffrey Prosser. Adrian Prosser. Pro se. Dawn Prosser. Pro se. John P. Raynor, Esquire. Pro se.

MEMORANDUM OPINION

Dated: August 7, 2009
Wilmington, Delaware

/s/ Sue L. Robinson
ROBINSON, District Judge

I. INTRODUCTION

Plaintiffs National Rural Utilities Cooperative Finance Corporation ("CFC"), Rural Telephone Finance Cooperative ("RTFC"), Sheldon C. Peterson ("Peterson"), John J. List ("List"), Steven L. Lilly ("Lilly"), R. Wayne Stratton ("Stratton"), Fulbright & Jaworski, L.L.P. ("Fulbright"), Greenlight Capital, Inc. ("Greenlight Inc."), Greenlight Capital, L.P. ("Greenlight L.P."), Greenlight Capital Qualified, L.P. ("Greenlight Qualified"), and Greenlight Capital Offshore, Ltd. ("Greenlight Offshore") (collectively, "plaintiffs") brought this

suit against defendants Jeffrey Prosser ("Prosser"), Dawn Prosser, Adrian Prosser, and John P. Raynor, Esquire ("Raynor") (collectively, "defendants") on February 2, 2009, alleging breach of contract. (D.I. 1) At issue are releases executed in 2006 in conjunction with a litigation settlement. (*Id.*) Plaintiffs allege that defendants breached these releases in December 2008 by bringing claims that are subject to the releases against plaintiffs in the United States District Court for the District of the Virgin Islands. (*Id.*)

Pending before the court are several motions: a motion to refer the case to the Honorable Judith K. Fitzgerald, visiting judge for the United States Bankruptcy Court for the District of Delaware,[1] filed by plaintiffs (D.I. 10); motions to dismiss filed by Dawn Prosser (D.I. 21) and Adrian Prosser (D.I. 24); a motion to dismiss or, in the alternative, to stay filed by Prosser (D.I. 39); a motion to dismiss and for sanctions filed by Raynor (D.I. 22); a motion for preliminary injunction filed by plaintiffs (D.I. 28); a motion to strike Dawn Prosser's reply brief filed in connection with her motion to dismiss or, in the alternative, for leave to file a surreply filed by plaintiffs (D.I. 45); and a motion to strike the declaration of William R. Greendyke, Esquire, filed by Raynor (D.I. 52). The court has jurisdiction pursuant to 28 U.S.C. § 1332. For the reasons that follow, the court

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[1] Judge Fitzgerald sits as a judge for the United States Bankruptcy Court for the Western District of Pennsylvania.

grants the motion to refer the case and, consequently, denies the remaining motions without prejudice to renew.

II. BACKGROUND

A. The Parties

CFC and RTFC are not-for-profit cooperative associations organized under the laws of the District of Columbia with their respective principal places of business in Herndon, Virginia. (D.I. 1 at ¶¶ 8-9) CFC lends money to its rural utility system members to enable them to acquire, construct, and operate facilities related to the generation, transmission, and distribution of electricity. (*Id.* at ¶ 25) RTFC is a member of CFC and is in the business of providing, securing, and arranging financing for its rural telecommunications members and their affiliates. (*Id.* at ¶ 26) The four individuals named as plaintiffs all have some connection with CFC, RTFC or both: Petersen is the governor and chief executive officer of CFC and RTFC; Lilly is the senior vice president and chief financial officer of CFC and RTFC; List is the senior vice president of members services and general counsel of CFC and RTFC; and Stratton is a member of CFC's Board of Directors. (*Id.* at ¶¶ 10-13) Fulbright is a law firm that has served as litigation counsel to CFC, RTFC, Lilly, and List. (*Id.* at ¶ 14) The remaining plaintiffs, Greenlight Inc., Greenlight Capital, Greenlight Qualified, and Greenlight Offshore (collectively, "the Greenlight entities"), are investments funds and,

outside of litigation, are not connected with the other plaintiffs. (*Id.* at ¶¶ 15-17, 27) Greenlight Inc. is the investment manager of the Greenlight entities. (*Id.* at ¶ 27)

Prosser has presided or does now preside over a group of interrelated telecommunications and media companies located primarily in the Caribbean. (*Id.* at ¶ 28) Prosser and his wife Dawn Prosser own Innovative Communication Company, LLC ("ICC-LLC"). (*Id.* at ¶¶ 18, 32, 34) ICC-LLC is the parent company of Emerging Communications, Inc. ("ECI"), which is the parent company of Innovative Communication Corporation ("ICC"). (*Id.* at ¶ 31) ICC is in the business of furnishing telephone, cable television, and other communication services and facilities in an around the Caribbean, including the U.S. Virgin Islands. (*Id.* at ¶¶ 29, 31) ICC is also the parent company of the Virgin Islands Telephone Company ("Vitelco"), which is the incumbent local landline telephone company in the Virgin Islands. (*Id.* at ¶ 30) Prosser was chief executive officer, president, and chairman of the board of ICC, a member of the board of Vitelco, and the sole managing member of ICC-LLC. (*Id.* at ¶ 32) Raynor was a member of the boards of both ICC and Vitelco and has served as a consultant and attorney to ICC. (*Id.* at ¶ 33) Adrian Prosser (Prosser's son) was a management employee of ICC. (*Id.* at ¶¶ 20, 34)

B. The Events Leading to the Instant Suit

This suit arises from two, ultimately intertwining, sets of events. The first set of events stems from a 1998 transaction in which ICC-LLC took ECI private, that is, ICC-LLC (already owner of 52% of ECI) purchased ECI's publicly-owned shares. (*Id.* at ¶ 37) After the privatization transaction was complete, the Greenlight entities sued ICC-LLC, Prosser, Raynor, ECI, and others in the Delaware Court of Chancery for breach of fiduciary duties and sought, *inter alia*, appraisal of their shares. (*Id.* at ¶¶ 38-39) In June 2004, Prosser and Raynor were found liable for breach of fiduciary duties and had judgments entered against them ("the Greenlight judgments") that, with interest to date, total more than $160 million. (*Id.* at ¶ 39) In February 2006, after ICC-LLC, ECI, and Prosser failed to pay the Greenlight judgments, the Greenlight entities filed involuntary chapter 11 petitions against ICC-LLC, ECI, and Prosser in the United States Bankruptcy Court for the District of Delaware ("the Delaware bankruptcy proceeding"). (*Id.* at ¶ 40) Judge Fitzgerald presides over the Delaware bankruptcy proceeding.

The second set of events stems from loans made by RTFC to ICC between 1987 and 2001. (*Id.* at ¶ 41) Vitelco was a member of RTFC and, during the period, RTFC made several loans to Vitelco's parent, ICC, totaling in excess of $500 million. (*Id.*) In connection with these loans, RTFC obtained various guaranties and security interests from others, including ICC-LLC, ECI, and Prosser. (*Id.*) In April 2003, following

negotiations, RTFC and ICC amended their loan agreements and, in connection therewith, RTFC obtained additional guaranties and security interests from, *inter alia*, ECI and Prosser. (*Id.* at ¶ 42)

In 2004, RTFC sued ICC for defaulting under the amended loan agreement. (*Id.* at ¶ 43) ICC and Vitelco countersued both CFC and RTFC, and so commenced protracted litigation between CFC/RTFC, on the one side, and Prosser/Raynor and their companies on the other. Indeed, by 2006, there were eight lawsuits pending in the United States District Court for the District of the Virgin Islands between CFC and/or RTFC and Prosser and/or his companies (referred to collectively herein as the "RTFC loan default litigation"). (*Id.* at ¶ 44)

During the course of the RTFC loan default litigation, Prosser and his companies asserted claims against most of the plaintiffs. (*Id.* at ¶ 45) Many of the claims were premised on a core set of allegations: that CFC unlawfully "controls" and "manipulates" RTFC; that CFC and RTFC have engaged in a long-standing "scheme" to subsidize RTFC and to "misappropriate" RTFC's and its members' funds while interfering with ICC's ability to perform its loan obligations to RTFC; and "retaliation" against Prosser and his companies as a result of Prosser's having discovered this "scheme." (*Id.* at ¶ 46) Vitelco and ICC also asserted claims against CFC, RTFC, and the Greenlight entities premised on some of these same allegations along with allegations that the Greenlight entities' commencement of the Delaware bankruptcy

proceeding was part of a "joint venture" between the Greenlight entities and RTFC to take over Vitelco and ICC. (*Id.* at ¶ 47)

In 2006, the two sets of events became intertwined through a series of settlement agreements. On April 26, 2006, the parties involved in the RTFC loan default litigation and the Delaware bankruptcy proceedings executed the Terms and Conditions of Settlement of Claims of RTFC, CFC, Prosser Parties, and Greenlight Entities (the "Terms and Conditions"). (*Id.* at ¶ 48) In addition to the 2006 Terms and Conditions, two other agreements were subsequently executed: the Release in Full of RTFC, CFC, Lilly and List (the "RTFC Release") and a release of the Greenlight entities (the "Greenlight Release"). (*Id.* at ¶¶ 54, 72)

Pursuant to the Terms and Conditions, Prosser and his companies' claims in the RTFC loan default litigation were dismissed and ICC was adjudged liable for $524 million in favor of RTFC, with Prosser jointly and severally liable for up to $100 million of that judgment (the RTFC judgments"). (*Id.* at ¶ 49) All appeals of the Greenlight judgments were also dismissed and, at the request of Prosser and his companies, the stay was lifted in the Delaware bankruptcy proceeding to allow implementation of the settlement. (*Id.* at ¶ 50) Finally, the Terms and Conditions provided that Prosser and his companies could discharge the RTFC and Greenlight judgments for a discounted payment on or before July 31, 2006; if they did not, documents put into escrow by RTFC,

CFC, and the Greenlight entities "as necessary to permit the Prosser Parties to [make the discounted payment]" – mutual releases, discharges of liens, confidentiality agreements, etc. – would become void. (*Id.* at ¶ 52; D.I. 50, ex. A at 5)

Prosser and his companies did not make the discounted payment on July 31, 2006. (D.I. 1 at ¶ 52) Instead, Prosser, ICC-LLC, and ECI filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the District of the Virgin Islands (the "Virgin Islands bankruptcy court"). (*Id.*) The Greenlight entities subsequently filed an involuntary petition for relief against ICC, which is still pending.[2] (*Id.* at ¶ 53) Both RTFC and the Greenlight entities filed claims as creditors against Prosser, ECI, ICC-LLC, and ICC in the Virgin Islands bankruptcy proceeding. (*Id.* at ¶ 95) Judge Fitzgerald also presides over the Virgin Islands bankruptcy proceeding.

Despite the settlement agreements in 2006, much litigation followed. In April 2008, Prosser and Raynor sued CFC and others in the United States District Court for the District fo Columbia (the "D.C. Action") based on allegations similar to those made in the RTFC loan default litigation.[3] (*Id.* at ¶¶ 99-100) Also

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[2] The pending bankruptcy proceedings of Prosser, ICC-LLC, ECI, and ICC before the Virgin Islands bankruptcy court are referred to collectively here as the "Virgin Islands bankruptcy proceeding."

[3] CFC's motion to dismiss was granted in May 2008. (D.I. 1 at ¶¶ 101-103)

in April 2008, Prosser filed objections to claims made by RTFC and the Greenlight entities in the Virgin Islands bankruptcy proceeding, raising (in his objection to RTFC's claim) allegations similar to those made in the RTFC loan default litigation.[4] (*Id.* at ¶ 95) Likewise, on December 7, 2008, defendants field suit in the United States District Court for the District of the Virgin Islands against plaintiffs (the "2008 Virgin Islands action"), again making allegations similar to those made in the previous litigation. (*Id.* at ¶¶ 86-89)

Plaintiffs bring the instant suit to enjoin the 2008 Virgin Islands action, arguing that the 2008 Virgin Islands action constitutes a breach of the RTFC Release and the Greenlight Release. Both Releases and the Terms and Conditions provide:

> "[A]ny litigation enforcing the terms and conditions herein, or otherwise related in any way to the matters addressed herein . . . shall be brought exclusively in the United States Bankruptcy Court for the District of Delaware . . . or in the United States District Court for the District of Delaware . . . to the extent that the Bankruptcy Court cannot or will not exercise jurisdiction."

(*E.g.*, D.I. 50, ex. A at 2; D.I. 12, ex. 1 at 6; D.I. 12, ex. 2 at 5)

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[4] Prosser's objection to RTFC's claim was stricken in July 2008. (D.I. 1 at ¶ 98)

III. DISCUSSION

The court limits its discussion to plaintiffs' motion to refer the case to Judge Fitzgerald. The district court may refer to the bankruptcy court any matter that is "at least related to [a] bankruptcy." *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991) (internal quotations omitted); *see also* 28 U.S.C. § 157(a). A matter is "related to" a bankruptcy if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Marcus Hook*, 943 F.2d at 264 (original emphasis omitted). "Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankruptcy estate.'" *Id.* (quoting *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989)).

It is clear to the court that the outcome in the proceeding *sub judice* could have an effect on the estates being administered in the Delaware and Virgin Islands bankruptcy proceedings. To wit, the 2008 Virgin Islands action is based in part on injury to Prosser's companies now in bankruptcy, meaning that any recovery in that action would belong, at least in part, to those bankruptcy estates. Because the present action concerns whether the Releases bar the 2008 Virgin Islands action, it conceivably affects the estates' ability to recovery in the 2008 Virgin Islands action. Accordingly, for at least this reason, the court

concludes that it may properly refer this matter to the bankruptcy court.[5]

Moreover, the court concludes that referral is appropriate. First, the parties agreed in the Releases that the United States Bankruptcy Court for the District of Delaware is a proper venue, and the court will enforce that forum selection agreement "unless the party objecting to its enforcement demonstrates that enforcement of the clause would violate a strong public policy of the forum." *In re Exides Techs.*, 544 F.3d 196, 218 n.15 (3d Cir. 2008); *see also Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1218-19 (3d Cir. 1991). Defendants have not made this showing.

Second, referral to the bankruptcy court promotes judicial economy. The court assumes that this case will be assigned to Judge Fitzgerald, who already presides over both the Delaware and Virgin Islands bankruptcy proceedings and is familiar with the parties and the convoluted facts underlying this case. Judge Fitzgerald has already had occasion to construe the Releases at issue. The court, then, deems it an appropriate exercise of discretion to refer the instant case to the bankruptcy court.

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[5] "Related to" jurisdiction includes "litigation between third parties that has an effect on the [bankruptcy] estate." *In re Federal-Mogul Global, Inc.*, 282 B.R. 301, 305 (D. Del. Bankr. 2002) (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995)). Thus, to the extent that the instant case involves third parties not named in the bankruptcy cases but whose claims could affect the estates, bankruptcy court jurisdiction is proper.

IV. CONCLUSION

For the aforementioned reasons, the court grants plaintiffs' motion to refer the case (D.I. 10) and denies all other motions (D.I. 21, 22, 24, 28, 39, 45, 52) without prejudice to renew. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, *et al.*,	)	
Plaintiffs,	)	Civ. No. 09-111-SLR
v.	)	
JEFFREY PROSSER, *et al.*,	)	
Defendants.	)	

ORDER

At Wilmington this 7th day of August, 2009, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Plaintiffs' motion to refer the case to the United States Bankruptcy Court for the District of Delaware (D.I. 10) is granted.

2. All other pending motions (D.I. 21, 22, 24, 28, 39, 45, 52) are denied without prejudice to renew.

/s/ Sue L. Robinson
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, et al.,	)	
Plaintiffs,	)	Civ. No. 09-111-SLR
v.	)	
JEFFREY PROSSER, et al.,	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 1st day of December, 2009, having considered defendants' motion for reconsideration and plaintiffs' response thereto;

IT IS ORDERED that said motion (D.I. 57) is denied, for the reasons that follow:

1. **Background.** By memorandum opinion and order dated August 7, 2009 (D.I. 55, 56), I granted plaintiffs' motion to refer the above captioned case to the United States Bankruptcy Court for the District of Delaware. The history of this, and related, litigation is complex and adequately explained in the August 7, 2009 opinion. In summary, however, by 2006, there were multiple lawsuits pending in the United States District Court for the District of the

Virgin Islands between various of the plaintiffs and defendants at bar, as well as involuntary bankruptcy proceedings pending in the Delaware bankruptcy court against defendant Jeffrey Prosser ("Prosser") and two companies owned by Prosser[1] (the "ICC debtors"). In 2006, certain of the parties resolved the above disputes through a negotiated settlement ("the 2006 settlement"), which included releases executed in connection therewith. Rather than satisfy certain of the judgments entered against him pursuant to the 2006 settlement, defendant Jeffrey Prosser filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the District of the Virgin Islands,[2] and defendants filed suit in the United States District Court for the District of the Virgin Islands against plaintiffs at bar (the "2008 Virgin Islands action"). The crux of the 2008 Virgin Islands action is that plaintiffs at bar conspired to misappropriate funds belonging to the ICC debtors and to strip defendants of their interests in the ICC debtors.

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[1] Innovative Communication Company, LLC ("ICC-LLC") and Emerging Communications, Inc. ("ECI"). Prosser and his wife, defendant Dawn Prosser, own ICC-LLC, which is the parent company of ECI, which is the parent company of Innovative Communication Corporation ("ICC"). ICC is in the business of furnishing telephone, cable television, and other communication services and facilities in and around the Caribbean, including the U.S. Virgin Islands. Defendant John P. Raynor, Esquire, was a member of the Board of Directors of ICC; defendant Adrian Prosser was a management employee of ICC.

[2] The Honorable Judith K. Fitzgerald presides over both the Delaware and Virgin Islands bankruptcy proceedings.

Plaintiffs brought the instant lawsuit to enjoin the 2008 Virgin Islands action, arguing that defendants breached certain releases executed in connection with the 2006 settlement by commencing that litigation. Consistent with forum selection clauses contained in the releases,[3] the litigation was referred to the Delaware bankruptcy court.

2. **Standard of review.** Defendants bring their motion for reconsideration pursuant to D. Del. LR 7.1.5, which provides that motions for reargument "shall be sparingly granted," generally only "when (i) the court has patently misunderstood a party; (ii) the court has made a decision outside of the adversarial issues presented to the court by the parties; or (iii) the court has made an error not of reasoning but of apprehension." *Inline Connection Corp. v. AOL Time Warner Inc.*, 395 F. Supp. 2d 115, 118 (D. Del. 2005) (citations omitted). The question posed by such a motion is whether the court understood and addressed the issues presented by the parties. Certainly such a motion does not present an opportunity to either "rehash arguments which have already been briefed by the parties and considered and decided by the court," *Ciena Corp. v. Corvis Corp.*, 352 F. Supp.

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[3] "[A]ny litigation enforcing the terms and conditions herein, or otherwise related in any way to the matters addressed herein . . . shall be brought exclusively in the United States Bankruptcy Court for the District of Delaware . . . or in the United States District Court for the District of Delaware . . . to the extent that the Bankruptcy Court cannot or will not exercise jurisdiction." (D.I. 50, ex. A at 2)

2d 526, 527 (D. Del. 2005), or to "argue new facts or issues that inexcusably were not presented to the court in the matter previously decided," *In re W.R. Grace & Co.*, 398 B.R. 368, 372 (D. Del. 2008) (citations omitted).

3. **Analysis.** Defendants posit four grounds in support of their motion, based in part on the fact that, because the court did not entertain oral argument on the referral motion, the court must have "either misunderstood, not considered, or misapprehended" the "due process implications" underlying defendants' motion. (D.I. 58 at 3) Before specifically addressing the four grounds *seriatim*, let me emphasize that oral argument is the exception, not the rule, in most civil cases and, therefore, I reject emphatically the notion that defendants have any due process expectations in this regard.

a. **Subject matter jurisdiction.** Defendants argue that, because this court lacks subject matter jurisdiction over the complaint at bar in the first instance, it cannot refer the matter to the bankruptcy court. A careful reading of the statutory scheme disclosed in 28 U.S.C. §§ 157 and 1334 proves defendants wrong. Section 1334 reads in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) **Except as provided in subsection (e)(2),** and notwithstanding any Act of

> Congress that confers exclusive jurisdiction on a court or courts other than the district courts, **the district courts shall have original but not exclusive jurisdiction of all civil proceedings** arising under title 11, or arising in or **related to cases under title 11. . . .**
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have **exclusive jurisdiction –**
>
> (1) **of all the property,** wherever located, **of the debtor** as of the commencement of such case, **and of property of the estate**; and
>
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

(emphasis added) The bases for jurisdiction under § 1334 mirror the bases for referral to a bankruptcy court under the referral statute, 28 U.S.C. § 157(a).[4]

b. With respect to jurisdiction under § 1334(b), a civil proceeding is sufficiently "related to" a bankruptcy case if "the outcome of that proceeding could

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[4] Section 157(a) provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

conceivably have any effect on the estate being administered in bankruptcy." *In re Marcus Hook Dev't Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991) (quoting *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984)). Defendants do not specifically argue that the complaint at bar is not "related to" a case under title 11. Instead, they argue that § 1334(e) strips this court of subject matter jurisdiction.

c. Contrary to defendants' argument, neither subsections (e)(1) nor (e)(2) apply to the facts at bar. The instant litigation is a contract action for injunctive and other relief seeking to enforce those certain releases discussed above. Plaintiffs are seeking to enforce the releases, not seeking ownership or rights in the property of the debtors' estates. *See, e.g., In re CitX Corp.,* 302 B.R. 144, 161 n.10 (Bankr. E.D. Pa. 2003) ("unless an action involves the actual recovery of property of the estate, rather than reparations paid for damages suffered, the action may proceed" in a "non-bankruptcy forum"); *cf., Phar-Mor, Inc. v. Coopers & Lybrand,* 22 F.3d 1228, 1235 n.10 (3d Cir. 1994) (recognizing propriety of removal under 28 U.S.C. § 1452 to a district court – not the court under which the related bankruptcy case was pending – to hear a civil proceeding related to the bankruptcy case, pursuant to § 1334). Therefore, § 1334(e)(1) does not divest this court of subject matter jurisdiction. Moreover, subsection (e)(2), which provides for the presiding bankruptcy court's exclusive jurisdiction over claims and causes of action regarding a trustee's

employment of professionals, has no relevance to the issues at bar.

d. **Case or controversy.** Bankruptcy courts are empowered to issue injunctions pursuant to 11 U.S.C. § 105(a), and to decide issues (either as final decisions or as proposed findings of fact and conclusions of law) consistent with their jurisdiction as prescribed in 28 U.S.C. §§ 157 (c)(1) and (d). There is an immediate question before the court – whether defendants have breached the releases by commencing the 2008 Virgin Islands action – and the bankruptcy court has the authority to review the substantive question and grant relief (or to recommend same to the district court), consistent with its § 1334(b) jurisdiction.

e. **Jury trial.** Although the bankruptcy court in Delaware is not yet authorized to conduct jury trials, it is entirely appropriate and consistent with my practice to refer matters to the bankruptcy court pretrial.

f. **Jurisdiction over third parties.** Bankruptcy courts have jurisdiction over "suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards,* 514 U.S. 300, 308 n.5 (1995); *In re Federal-Mogul Global, Inc.,* 282 B.R. 301, 305 (Bankr. D. Del. 2002). Moreover, the Delaware bankruptcy court can exercise jurisdiction over the related third parties at bar, as these defendants are bound by the forum selection clauses in the releases at issue. Such clauses are "prima facie valid," *In re Fruit of the Loom, inc.*, 407 B.R. 593, 598

(Bankr. D. Del. 2009), and are equally binding on bankruptcy courts. *See, e.g., Street v. The End of the Road Trust,* 386 B.R. 539, 547 (D. Del. 2008).

g. **Chapter 7 estate.** As described above, in the 2008 Virgin Islands action, defendants at bar seek damages based on pre-petition conduct that allegedly harmed the ICC debtors and defendants' interests therein. It is apparent that the bankruptcy estates of Prosser and the ICC debtors have economic interests in the 2008 Virgin Islands action, which interests will be impacted by any ruling on the validity of the releases at issue. More significantly, by portraying the Delaware involuntary bankruptcy cases as part of an overarching scheme to strip defendants of their control over the ICC debtors, the 2008 Virgin Islands action is a collateral attack on such proceedings. "Related to" jurisdiction under § 1334(b)(2) certainly exists, whether or not the chapter 7 trustee in Prosser's voluntary bankruptcy case has an interest.

h. **Judicial economy.** The interest of judicial economy can never be the sole consideration justifying a referral, but is always an appropriate consideration once jurisdiction has been independently established. Therefore, there was no error in my taking into account Judge Fitzgerald's history with the parties and the underlying litigation when granting the motion.

/s/ Sue L. Robinson
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JEFFREY J. PROSSER, DAWN PROSSER, ADRIAN PROSSER, and JOHN P. RAYNOR,	:	1:08-cv-107
Plaintiffs,	:	Hon. John E. Jones III
v.	:	
NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION; et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

December 8, 2009

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending before the Court is a Motion to Refer the above-captioned case to the Honorable Judith K. Fitzgerald in her capacity as a visiting judge in the District Court of the Virgin Islands, Bankruptcy Division pursuant to 28 U.S.C. § 157 and District Court for the District of the Virgin Islands' April 1, 1990 Standing Order ("the Motion"). (Doc. 89). The Movants on the instant Motion are: Defendants

National Rural Utilities Cooperative Finance Corporation, Rural Telephone Finance Cooperative, Sheldon C. Petersen, John J. List, Steven L. Lilly, R. Wayne Stratton, Fulbright & Jaworski L.L.P., Greenlight Capital, Inc., Greenlight Capital Qualified, L.P., Greenlight Capital, L.P. and Greenlight Capital Offshore, Ltd. Plaintiffs oppose the Motion. The Motion has been fully briefed by the parties. Additionally, the Movants have filed supplementation to the Motion. All of the briefing on the Motion has been thoroughly considered by the Court.

The Movants assert that the instant Action must be referred to Judge Fitzgerald inasmuch as the action is actually a collateral attack on four bankruptcy cases pending before Judge Fitzgerald in the Virgin Islands Bankruptcy Court.[1] Of particular importance and significance here is the existence of forum selection clauses in two general releases to which Plaintiffs are a party that select the United States Bankruptcy Court for the District of Delaware as the forum in which any claims related to the releases must be brought. The Movants state that once this matter is referred to Judge Fitzgerald, they

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[1] The cases are: the Chapter 7 bankruptcy case of lead Plaintiff Jeffrey Prosser, and three Chapter 11 cases involving Inovative Communication Company, LLC, Emerging Communications, Inc. and Innovative Communication Corporation, companies that Plaintiffs Jeffrey Prosser and Dawn Prosser allegedly owned and allegedly employed Plaintiffs Adrian Prosser and Raynor. We shall refer to the Chapter 11 Bankruptcy cases as the "Prosser-related Bankruptcies."

shall immediately petition for the case to be referred to the Delaware Bankruptcy Court.

Based on our review of the submissions, in particular the rulings by Judge Fitzgerald in the Chapter 7 Prosser Bankruptcy and the Chapter 11 Prosser-related Bankruptcies and rulings in the United States District Court for the District of Delaware (wherein cases also involving the releases were transferred to the Delaware Bankruptcy Court), we find that the interests of justice and judicial economy require that this case be referred to Judge Fitzgerald, visiting Judge in the United States Bankruptcy Court for the District of the Virgin Islands. If the instant case were allowed to proceed here, the possibilities of divergent rulings on the same subject matter are very real.[2] In addition, the Court questions the ability of Prosser and the other plaintiffs to bring and maintain this action in light of the various pending bankruptcies. Accordingly, the Motion shall be granted.

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[2] Plaintiff is essentially attempting to create a parallel litigation universe, which is fraught with peril in the form of inconsistent rulings. For example, Plaintiffs call into question the propriety of certain acts of the bankruptcy Trustee – the same bankruptcy Trustee appointed by the Bankruptcy Court. Determinations regarding acts of the bankruptcy Trustee are assuredly better suited in the hands of the learned Bankruptcy Judge who is more familiar with the circumstances attendant to the bankruptcies.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion to Refer Case to The Honorable Judith K. Fitzgerald as a Visiting Judge in the Virgin Islands Bankruptcy Court (Doc. 89) is **GRANTED**.

2. This case is referred to the Honorable Judith K. Fitzgerald, as a Visiting Judge in the Virgin Islands Bankruptcy Court.

3. The Clerk of Court is directed to **CLOSE** the file on the above-captioned matter.

/s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-4683

JEFFREY J. PROSSER, et al., Appellants

v.

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, et al.
(D.V.I. No. 1-08-cv-00107)

No. 09-4684

NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, et al.

v.

JEFFREY J. PROSSER, et al., Appellants
(Del. D.C. No. 1-09-cv-00111)

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: 12 October 2010